FINANCIAL SERVICES REPORT

Award Winning Newsletter

Quarterly News, Fall 2019

IN THIS ISSUE

MOFO METRICS

14	Percentage of U.S. population that goes camping, per year
1927	Year of first official recipe for s'mores
$3,900	Cost of most expensive camping spot in the world, per night
3.7	Length of average camping trip by RV users, in nights
2.5	Length of average camping trip by tent users, in nights
$128	Average amount spent on first camping trip
280	Number of people who visit national parks, per year, in millions
120	Number of people who die in national parks, per year

EDITOR'S NOTE

We start this issue with a feeling of déjà vu all over again. Decisions made during the mortgage crisis are back in the news with a powerhouse legal ruling and the Treasury's initial thinking on how to turn back time. First, the Fifth Circuit issued an *en banc* decision finding the Federal Housing Finance Agency single-director structure is unconstitutional and that GSE investors may pursue their claim that FHFA exceeded its authority by directing the GSEs' profits to the Treasury. Whether this part of the Fifth Circuit's ruling impacts the debate among the courts on the constitutionality of the structure of the CFPB—which similarly has a single director who can only be removed for cause—remains to be seen.

Second, the Treasury released its Housing Reform Plan aimed at ending the government's conservatorship of the GSEs. The Plan only underscores how challenging unwinding the financial crisis actions will be. Among several options for raising the capital needed for the GSEs to become independent is the possibility of ending the directing of their profits to the Treasury, the action targeted in the case revived by the Fifth Circuit's decision.

Read on for more on the GSEs, the news in Beltway, Operations, Bureau, Privacy, BSA/AML, and more.

BELTWAY

Military Credit Monitoring

The FTC issued a Final Rule implementing parts of a federal law that modified the FCRA to require CRAs to provide free electronic credit monitoring service to active duty service members. The FCRA amendment requires CRAs to notify service members about any "material" additions or modifications to their credit files, and the Final Rule defines key terms such as "electronic credit monitoring service" and "material additions or modifications." CRAs are required to comply no later than October 31, 2019, but CRAs can comply with certain parts of the Final Rule by offering their existing commercial credit monitoring services to active duty service members for free for a period of one year from the effective date.

For more information, contact Angela Kleine at akleine@mofo.com.

Joining the Cool Kids

Following other federal banking agencies, the FDIC launched a new publication, ***Consumer Compliance Supervisory Highlights***, to "enhance transparency regarding the FDIC's consumer compliance supervisory activities." In the inaugural issue, the FDIC noted that of approximately 1,200 consumer compliance examinations conducted, "[o]verall, supervised institutions demonstrated strong and effective management of consumer compliance responsibilities." The FDIC did identify several areas in which it identified compliance issues: (1) overdraft programs (e.g., UDAP violations around the use of the "available balance" method to access overdraft fees); (2) RESPA anti-kickback violations; (3) violations of Regulation E (e.g., misapplying timing requirements); and (4) inadequate disclosures for "Skip-A-Payment" programs.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

You Get a Division!

The FDIC announced the creation of a new division, the Division of Complex Institution Supervision and Resolution (CISR), in an effort to "centralize the supervision and resolution activities for the largest banks and complex financial institutions." The CISR Division will be led by Rick Delfin, the current Director of the FDIC's Office of Complex Financial Institutions, and will be operational on July 21, 2020. Under the new structure, the CISR Division will handle the FDIC's supervision and monitoring of banks with assets of more than $100 billion for which the FDIC is not the primary regulator and will be responsible for planning and executing the FDIC's resolution mandates for these banks.

For more information, contact Oliver Ireland at oireland@mofo.com.

Overbilling

The SEC announced a settlement with a bank to resolve allegations that the bank overcharged its mutual funds and other registered investment company customers. The bank self-reported the overcharges to the SEC. The SEC alleged that the bank violated the Investment Company Act by "secretly" marking up the cost of sending secure messages through SWIFT. As part of the settlement, the bank agreed to pay approximately $49 million for customer refunds and a $40 million civil money penalty. The SEC noted that in addition to self-reporting, the bank took several remediation steps, including, enhanced governance and oversight related to customer invoicing and developing a new standard fee schedule.

For more information, contact Susan Gault-Brown at sgaultbrown@mofo.com.

Smaller Bank, Smaller Reporting Requirements

The OCC, FDIC, and Federal Reserve issued a Final Rule reducing call report requirements for certain institutions during certain times of the year. Under the Final Rule, financial institutions with less than $5 billion in assets, having no foreign offices, not treated as a "large" or "highly complex" institution for deposit insurance assessment purposes, and not an "advanced approaches institution" or a state-licensed insured branch of a foreign bank may file an abbreviated call report in the first and third calendar quarters.

For more information, contact Oliver Ireland at oireland@mofo.com.

BUREAU

So What Does "Abusive" Actually Mean?

During a June symposium, CFPB Director Kraninger indicated that the CFPB is considering issuing guidance or a rule that would define what constitutes an "abusive" act or practice. The Dodd-Frank Act prohibits covered persons and service providers from engaging in an unfair, deceptive, or abusive act or practice. Prior to the enactment of Dodd-Frank, the standards for "unfair" and "deceptive" acts or practices were generally well established, but the standard for "abusive" acts or practices had never been defined. Despite the relative lack of clarity, the CFPB has brought numerous enforcement actions alleging abusive acts or practices.

For more information, contact Nancy Thomas at nthomas@mofo.com.

CFPB Settles with Largest Debt-Settlement Services Provider

The CFPB settled its lawsuit against the nation's largest debt-settlement services provider for alleged violations of the Telemarketing Sales Rule. The CFPB alleged that the company had failed to disclose consumers' right to funds and had engaged in deceptive and abusive acts or practices, including deceiving consumers about creditor's willingness to negotiate with the company and the fees and charges for the company's services, and directing consumers to negotiate directly with their own creditors and to deceive the creditors about their enrollment in the debt-settlement program. Under the settlement, the debt-settlement company will pay $20 million in restitution and a $5 million civil money penalty.

For more information, contact Angela Kleine at akleine@mofo.com.

CFPB Settles Predatory Lending Suit with Defunct For-Profit College

In August, the CFPB entered into a settlement with a now-defunct for-profit college for its role in allegedly predatory private lending programs. In June, the CFPB also entered into a settlement with the company that served as the lending arm for the for-profit college. Between the two settlements, the college will pay $60 million and the lending company will forgive all $168 million in student loans that it owns. The lawsuit against the companies' alleged numerous unfair and abusive acts or practices in connection with the for-profit college's predatory practices when marketing and offering student loans, including high-pressure sales tactics and taking unreasonable advantage of students' inability to protect their interests when selecting student loans.

For more information, contact Nancy Thomas at nthomas@mofo.com.

GAO Tells CFPB to Communicate Supervisory Expectations to CRAs

The GAO published a Report examining issues related to the consumer reporting market, including the causes of consumer report inaccuracies and how the CFPB exercises its supervisory and enforcement authority over CRAs. The Report recommends that the CFPB communicate its expectations to CRAs regarding reasonable procedures for ensuring maximum possible accuracy in consumer report information and reasonable investigations of consumer disputes. The CFPB disputed the GAO's findings, citing case law, enforcement actions, and various communications from the CFPB that address the relevant standards. In spite of the CFPB's response, the GAO maintained its recommendation for better communication of the CFPB's expectations.

For more information, contact Nathan Taylor at ndtaylor@mofo.com.

Debt Collection Is Big Business

The CFPB released a Report on third-party debt collection that found that more than one in four consumers with a credit report have at least one debt in collection by a third-party debt collector. The Report was based on a nationwide sample of approximately 5 million credit reports. The CFPB also found that over three quarters of the debts in collection by a third-party debt collector were for non-financial debt, including medical debt (58%) and telecommunication and utilities debt (20%). The Report noted the impact of trends in furnishing third-party debt collection information, such as much greater concentration of furnishing of tradelines by third-party debt buyers than by non-debt buyers.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

Protect Your Elders

The CFPB issued an updated advisory urging financial institutions to report suspected financial exploitation of older adults to the appropriate law enforcement authorities and to file suspicious activity reports (SARs) with the federal government. The updated advisory summarizes state requirements for mandatory reporting of suspected elder financial exploitation and discusses the federal Senior Safe Act, which limits financial institutions' liability for disclosing suspected elder financial exploitation to covered federal agencies if the financial institution has trained its employees on identifying elder financial exploitation. The advisory is intended to provide financial institutions with information about voluntary best practices.

For more information, contact Jessica Kaufman at jkaufman@mofo.com.

MOBILE & EMERGING PAYMENTS

Are We Running Yet?

In its latest step along the path to faster payments that the Federal Reserve kicked off in 2013, the Federal Reserve issued a Notice and Request for Comment on whether it should develop a new interbank faster payment system, FedNow, with a target launch in 2023 or 2024. The FRB proposes that FedNow would be an interbank real-time gross settlement (RTGS) service with integrated clearing functionality that can serve as the infrastructure on which other parties could build faster payment solutions. Despite the existence of a private-sector RTGS, the FRB explains that efficiency and safety issues could arise in a single-provider market, and that the existence of both a private-sector and public-sector option for RTGS would promote competition, spur innovation, lower prices, and create redundancies that could provide a buffer against a single point of failure in the payment system. Comments on the FedNow proposal are due by November 7, 2019.

For more information, please contact Trevor Salter at tsalter@mofo.com.

No-Action Reaction

The CFPB's Office of Innovation provided an update and selected performance metrics from the recipient of the CFPB's first No-Action Letter (NAL). As part of the CFPB's plan to assess the real-world impact of alternative data and machine learning, the NAL recipient compared outcomes from its alternative underwriting and pricing model against a traditional model featuring standard underwriting and credit file variables. The CFPB reports that the NAL recipient's model resulted in approvals of 27% more applicants than the traditional model while yielding lower average APRs. The CFPB expressed its view that the alternative model provided significantly expanded access to credit for consumers without any fair lending implications. Despite these findings, the CFPB's plan to expand the NAL policy drew the attention of a number of prominent lawmakers. They sent a letter to CFPB Director Kraninger questioning whether the expanded NAL policy could undermine NAL recipients' compliance with consumer protection laws and anti-discrimination laws.

For more information, please contact Trevor Salter at tsalter@mofo.com.

Not Again

For the second time, a federal court in the District of Columbia rejected the Conference of State Bank Supervisor's challenge to the OCC FinTech Charter, finding it was still unripe and that the plaintiff lacked standing. *Conf. of State Bank Supervisors v. OCC*, No. 18-cv-2449, 2019 WL 4194541 (D.D.C. Sept. 3, 2019). The court explained that nothing of significance had happened since the dismissal of the previous suit, including that no companies have yet applied for the Charter. The court disagreed with a New York federal judge's ruling allowing a challenge brought by the NY DFS to go forward.

For more information, please contact Nancy Thomas at nthomas@mofo.com.

MORTGAGE & FAIR LENDING

Start of a Long and Winding Road?

The Treasury Department issued a Housing Reform Plan that calls for the FHFA to end its conservatorship of Fannie Mae and Freddie Mac, undertaken in 2008 during the housing crisis. The Plan urges Congress to enact comprehensive housing reform, ending the GSEs' congressional charters and removing any "statutory privileges that give them a competitive advantage over private sector competition." Although the Plan does not advocate a federal guarantee for mortgages, it offers support for legislation that would include an "explicit, paid-for" guarantee for qualifying mortgage-backed securities. The Treasury Department also recommends that Congress replace the GSEs' affordable housing goals with a system of fees to support financial assistance to underserved communities, including low- and moderate income borrowers and first-time homebuyers.

For more information, contact Obrea Poindexter at opoindexter@mofo.com.

Here We Go Again

HUD has published a Notice of Proposed Rulemaking that would revise the current HUD regulation to reflect the Supreme Court's disparate impact ruling in *Texas Department of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S. Ct. 2507 (2015). In *Inclusive Communities*, the Supreme Court held that "disparate impact" discrimination is cognizable under the Fair Housing Act, but the Court went on to discuss the plaintiff's burden to show "robust causality" between the challenged policy and a disparate impact on a protected class. Drawing on language in *Inclusive Communities*, the Proposed Rule would significantly alter the burdens of plaintiffs and defendants, making it more difficult for a plaintiff to survive a motion to dismiss. Comments are due by October 18, 2019.

For more information, contact Obrea Poindexter at opoindexter@mofo.com or read our Client Alert.

Fair Lending Report Shows a Quiet 2018

This summer, the CFPB released its 2018 Fair Lending Report to Congress. Notably, the Report does not identify any public fair-lending enforcement actions filed in 2018, or any ECOA violations referred to the DOJ. It does indicate, however, that the CFPB is conducting a number of "ongoing fair lending investigations" involving a variety of consumer financial products. Overall, though, the Bureau emphasized its work to improve "access to credit" and "innovation in expanding responsible credit access."

For more information, contact Angela Kleine at akleine@mofo.com.

No Leg to Stand On

The Eleventh Circuit recently instructed the trial court to grant summary judgment in favor of the defendant bank in the long-running *City of Miami Gardens* fair lending case. 931 F.3d 1274 (11th Cir. 2019). Plaintiff Miami Gardens claimed that the bank engaged in discriminatory redlining in 2004-2008, which caused foreclosures and decreased the city's tax revenues. When the evidence came in, though, Miami Gardens was able to support its claims by pointing to (1) an allegedly discriminatory loan that the city's expert said would *likely* go into foreclosure and (2) a list of 10 defaulted loans. The appeals court held that this evidence was not enough to show an injury caused by the bank's actions and directed entry of judgment in favor of the defendant.

For more information, contact Angela Kleine at akleine@mofo.com.

LIBOR to SOFR

Fannie Mae and Freddie Mac (the GSEs) announced plans to develop new adjustable rate mortgage products that would rely on the Secured Overnight Financing Rate (SOFR) instead of LIBOR. Given the GSEs' dominance in the mortgage market, their re-designed ARMs will have a significant impact on hybrid ARMs of the future. The GSEs provided no details about the new products, but both pledged to rely on a framework provided in the Alternative Reference Rate Committee's whitepaper, titled *Options for Using SOFR in Adjustable Rate Mortgages*.

For more information, contact Oliver Ireland at oireland@mofo.com or read our Client Alert.

QM Quandary

The CFPB issued an Advance Notice of Proposed Rulemaking on the definition of a QM under its ability-to-repay/qualified mortgage rule. The current rule specifies several types of QMs, including loans eligible for sale to or guarantee by Fannie Mae or Freddie Mac, which covers the majority of home purchase loans made today. The ANPR indicates that the CFPB is considering whether to eliminate this class of QMs in January 2021. According to the ANPR, nearly one million mortgage loans made in 2018 would not have met the general QM test if this category of QMs were eliminated. The ANPR asserts that the FHA and private mortgage market may step in to fill the void, but the CFPB does not identify any basis for this claim. Comments are due September 16, 2019.

For more information, contact Obrea Poindexter at opoindexter@mofo.com or read our Client Alert.

Redlining: It's (Still) Alive!

The DOJ has resolved its first redlining matter initiated and settled under the Trump administration. The action against a national bank appears to have been DOJ-initiated, rather than arising from a referral by the bank's prudential regulator. The DOJ claimed that the bank excluded majority-black census tracts from its CRA assessment area; failed to maintain branches or "meaningfully advertise" in majority-black areas, while expanding into white areas; and implemented a mortgage lending policy that expressed a preference for "existing or potential customers" in the bank's majority-white "branch footprint." The DOJ also pointed to statistical analyses comparing the bank's application and origination volumes to those of peer institutions. To settle the action, the bank agreed to add various enhancements to its fair lending program, open a new branch, spend $500,000 on advertising and outreach, and invest at least $1.12 million in a loan subsidy fund. It did not pay a civil monetary penalty.

For more information, contact Nancy Thomas at nthomas@mofo.com.

OPERATIONS

Capital Treatment for ADC Loans

The federal banking agencies released a Notice of Proposed Rulemaking (July NPRM) regarding the capital treatment of certain loans that finance land improvements but do not finance the construction of residential homes on the land—i.e., acquisition, development, and construction (ADC) loans. The July NPRM supplements a September 2018 NPRM on related issues. Based on the July NPRM, these loans would be required to be risk-weighted at 150%, rather than the 100% risk-weighting generally accorded to other commercial loans. The proposal would distinguish ADC loans from loans that finance the construction of one- to four-family residential structures, which would continue to be risk-weighted at 100%.

For more information, contact Mark Sobin at msobin@mofo.com or read our Client Alert.

The Results Are in . . .

On June 27, 2019, the Federal Reserve released the results of its 2019 Comprehensive Capital Analysis and Review (CCAR). CCAR evaluates the capital planning processes and capital adequacy of 18 of the largest banking firms, including the firms' planned capital actions, such as dividend payments and share buybacks. In the 2019 CCAR, the Federal Reserve concluded that "the nation's largest banks have strong capital levels and virtually all are now meeting supervisory expectations for capital planning."

The Federal Reserve further announced that it was not objecting to the capital plans of all 18 firms subject to CCAR, but is requiring one firm to address certain limited weaknesses in its capital planning processes.

For more information, contact Oliver Ireland at oireland@mofo.com.

Getting Volcker Ducks in a Row

The federal agencies responsible for implementing the Volcker Rule published a Final Rule conforming the Volcker Rule implementing regulations to statutory modifications provided by Sections 203 and 204 of the Economic Growth, Regulatory Relief, and Consumer Protection Act (Regulatory Relief Act). Consistent with the Regulatory Relief Act, the Final Rule amends the regulations by incorporating the Regulatory Relief Act's: (a) exclusion of certain community banks from coverage of the rule; and (b) provision alleviating the restrictions on banking entities using the same name as hedge funds and private equity funds. The Final Rule took effect upon publication in the Federal Register.

For more information, contact Marc-Alain Galeazzi at mgaleazzi@mofo.com or read our Client Alert.

But Wait! There's More! Volcker Rule 2.0

The federal agencies responsible for implementing the Volcker Rule approved a Final Rule (with corrections) amending the Volcker Rule implementing regulations. The Final Rule addresses proprietary trading, compliance and metrics issues, and covered funds issues. It also codifies certain guidance previously published in the form of frequently asked questions. For foreign banking entities, the Final Rule provides burden relief by: (1) tailoring compliance obligations based on the level of U.S. trading assets and liabilities; and (2) removing certain restrictive conditions for exemptions from Volcker Rule prohibitions on covered fund and proprietary trading activities engaged in by foreign banking entities outside the United States. The Final Rule will take effect on January 1, 2020; however, banking entities will not be required to comply with the Final Rule until January 1, 2021.

For more information, contact Jiang Liu at jiangliu@mofo.com or read our Client Alerts here and here.

Hit the Easier Button

The federal banking agencies issued a Final Rule that simplifies several requirements in the regulatory capital rules. The Final Rule applies to banking organizations that do not use the "advanced approaches" capital framework, which generally means banking organizations with less than $250 billion in total consolidated assets and less than $10 billion in total foreign exposure. It simplifies the capital treatment for mortgage servicing assets, certain deferred tax assets, investments in the capital instruments of unconsolidated financial institutions, and minority interest. The Final Rule also allows bank holding companies and savings and loan holding companies in certain circumstances to redeem common stock without prior approval. It generally takes effect on April 1, 2020, with certain provisions related to the pre-approval requirements for the redemption of common stock and other technical amendments taking effect on October 1, 2019.

For more information, please contact Oliver Ireland at oireland@mofo.com.

PREEMPTION

All Roads Lead to Preemption

Three recent decisions rely on different analyses in concluding that statutory and common law claims challenging a furnisher's reporting to a CRA are preempted by the FCRA. A federal court in Alabama recognized that FCRA preemption of tort claims is "an area of little agreement among this district court's judges." *Goodreau v. U.S. Bank Trust N.A.*, No. 2:19-cv-0269, 2019 WL 2601543, at *6 (N.D. Ala. June 25, 2019). The court found that the narrower preemption provision in section 1681h(e) covers duties of information users, not duties of information furnishers. The court therefore sided with "the growing trend finding that § 1681t(b)(1)(F) bars state law tort claims based on inaccurate credit reporting by furnishers." *Id.* A federal court in New Jersey reached the same result, but relied on the express language of section 1681t(b)(1)(F) and congressional intent to create uniform, national procedures for furnishers that is inconsistent with application of a patchwork of state laws. *Bertollini v. Harrison*, No. 18-15355, 2019 WL 2296150, at *4 (D.N.J. May 30, 2019). Finally, a federal court in Kentucky looked to the Seventh Circuit's statutory construction analysis in finding that the two preemption provisions can be read together, with the earlier, narrower preemption provision preempting some state claims and the later, broader preemption provision preempting additional claims. *Cable v. Midland Funding, LLC*, No. 3:19-CV-00015, 2019 WL 3046098 (E.D. Ky. July 11, 2019).

For more information, contact Angela Kleine at akleine@mofo.com.

NSF Fee Claims Not Sufficient

Are state law claims challenging assessment of multiple NSF fees for multiple attempts to process a single payment preempted as to a federal credit union? It depends according to a federal court in Virginia. *Lambert v. Navy Fed. Credit Union*, No. 1:19-cv-103, 2019 WL 3843064 (E.D. Va. Aug. 14, 2019). The court reasoned that claims based on an alleged failure to disclose, the specific disclosure language, and the fairness of the practice are preempted by the FCAU and TISA implementing regulations, which authorize federal credit unions to determine disclosures and fees and charges "free from state regulation." *Id.* at *2 (quoting 12 C.F.R. § 701.35(c)). In contrast, claims based on breach of contract or affirmative misrepresentation are not preempted.

For more information, contact James McGuire at jmcguire@mofo.com.

Broad Grandfather Is Best

A federal court in California held that the Dodd-Frank provision grandfathering HOLA preemption for contracts entered into by federal thrifts before July 21, 2010 applies to loans purchased by a federal thrift before that date. *Smith v. Flagstar Bank, FSB*, No. C 18-05131, 2019 WL 2437276 (N.D. Cal. June 11, 2019). The court found that nothing in the language of section 5553 limited the provision to originations and that the federal thrift "entered into" the contract when it purchased the loan. The court relied on dictionary definitions of "entered into" as supporting this interpretation as well as legislative history indicating Congress intended courts to read this section broadly to "reinforce predictability and reliability." *Id.* at *4. As a result, the court found that HOLA preemption applied and a California statute requiring payment of interest on escrow accounts was preempted.

For more information, contact Nancy Thomas at nthomas@mofo.com.

PRIVACY

No Harm, Some Foul?

A heightened risk of identity theft is enough to establish standing to bring an action arising out of a data breach—at least in some parts of the country. Most recently, the D.C. Circuit affirmed its alignment on this point with its own precedent and with earlier rulings in the Ninth Circuit and the Seventh Circuit. *In re U.S. Office of Personnel Mgmt. Data Sec. Breach Litig.*, 928 F.3d 42 (D.C. Cir. 2019). The D.C. Circuit followed the Seventh Circuit in concluding that plaintiffs plausibly alleged that their stolen information could still be used maliciously, so there was a "substantial risk of future identity theft." The holding deepens a split with other circuits that have required an allegation of some harm caused by the data breach to establish Article III standing.

For more information, contact Nathan Taylor at ndtaylor@mofo.com.

Pile On

Equifax has reached a settlement with the CFPB, the FTC, and the states in connection with its 2017 breach. The underlying Complaint alleges, among other things, that Equifax's information security practices were inconsistent with the company's public representations, and that the failure to have in place "reasonable" information security measures was an unfair and deceptive act. Under the terms of the Stipulated Order, Equifax is required to establish a consumer fund with up to $425 million available for redress and provide free credit monitoring or a $125 reimbursement for consumers who seek credit monitoring services on their own. The Order also imposes a $100 million civil money penalty by the CFPB.

For more information, contact Nathan Taylor at ndtaylor@mofo.com.

This Should Do the Trick

New York amended its breach notification law by adopting the Stop Hacks and Improve Electronic Data Security (SHIELD) Act. The legislation aligns the New York law with similar laws in other states by broadening the definitions of both personal information (PI) and data breach, expanding the scope of covered entities subject to breach notification requirements, and imposing data security standards. For example, like the Massachusetts statute, under the SHIELD Act covered entities must develop, implement, and maintain reasonable administrative, technical, and physical safeguards to protect and dispose of PI. And, consistent with the California breach law, New York now defines covered information that triggers breach notification obligations to include biometric information, and user names or email addresses in combination with passwords or security questions and answers.

For more information, contact Miriam Wugmeister at mwugmeister@mofo.com or read our Client Alert.

A New California Export

By amending its online privacy policy law to create a right to opt out of the "sale" of personal information collected over a website or online service, Nevada is the first state to enact legislation including privacy obligations similar to those in the California Consumer Privacy Act (CCPA). The new Nevada law, Senate Bill 220, is narrower than the CCPA. For example, it addresses only the "sale" of personal information collected over a website or online service (as opposed to "sales" generally), and does not include other CCPA-like privacy rights, such as access and deletion. The Nevada opt-out right does not apply to a financial institution subject to the GLBA, which is a much broader carve-out than the GLBA exception under the CCPA that focuses on data subject to the GLBA (as distinct from entities subject to the GLBA).

For more information, contact Nathan Taylor at ndtaylor@mofo.com or read our [Client Alert](#).

ARBITRATION

Exception that Could Undermine the Rule

The Ninth Circuit held that the FAA did not preempt the California Supreme Court's holding that public injunctive relief claims are not arbitrable. *Blair v. Rent-A-Center, Inc.*, 928 F.3d 819 (9th Cir. 2019) (Case No. 17-17221 (9th Cir. June 28, 2019)). The court followed the California Supreme Court's analysis in finding public injunctive relief is a statutory right that cannot be waived. The court found the FAA did not preempted California law because the rule is a generally applicable contract defense that is not specific to arbitration and instead bars waiver of the right to pursue public injunctive relief in any forum.

For more information, contact James McGuire at jmcguire@mofo.com or read our [Client Alert](#).

Still More California Hostility to Arbitration Agreements

The California Supreme Court refused to enforce an arbitration agreement in an employment contract, finding it both procedurally and substantively unconscionable if applied to wage disputes. *Oto LLC v. Kho*, No. S244640, 2019 WL 4065524 (Cal. Aug. 29, 2019). The Court focused on the adhesion nature of the employment agreement, the length and complexity of the agreement, and the fact that litigation-like procedures were permitted. Under California law, wage disputes can occur in a more informal process called a Berman Hearing, which does not permit discovery. The dissent was forceful in arguing that the majority ignored U.S. Supreme Court precedent and stated, "today, the majority holds that an arbitration agreement is substantively unconscionable—and therefore unenforceable—precisely because it prescribes procedures that, according to the majority, have been 'carefully crafted to ensure fairness to both sides.' If you find that conclusion hard to grasp and counterintuitive, so do I." *Id.* at *16 (Chin, J, dissenting).

For more information, please contact Natalie Fleming Nolen at nflemingnolen@mofo.com.

TCPA

Let's Be Reasonable

The Eighth Circuit affirmed the trial court's post-trial decision that statutory damages for TCPA violations of $1.6 billion violated due process. *Golan v. FreeEats.com, Inc.*, 930 F.3d 950 (8th Cir. 2019). The six-day telemarketing campaign at issue, which involved former presidential candidate Mike Huckabee, purported to be a short survey but in fact advertised a conservative independent film. Although the jury found the defendant liable, the Eighth Circuit declined to impose statutory damages of $500 per violation, finding that the $1.6 billion award would be "obviously unreasonable and wholly disproportionate to the offense." *Id.* at 963 (citation omitted).

For more information, contact Tiffany Cheung at tcheung@mofo.com.

One Text Won't Stand

The Eleventh Circuit ruled that receiving a single unsolicited text message is insufficient to establish standing to sue in federal court. *Salcedo v. Hanna*, No. 17-1077, 2019 WL 4050424 (11th Cir. Aug. 28, 2019). The trial court found that the plaintiff had Article III standing based on receipt of a multimedia text message from his former attorney offering a small discount on services. According to the Eleventh Circuit, however, plaintiff's allegations were "categorically distinct" from the kinds of real but intangible harm that can confer standing: "The chirp, buzz, or blink of a cell phone receiving a single text message is more akin to walking down a busy sidewalk and having a flyer briefly waived in one's face. Annoying, perhaps, but not a basis for invoking the jurisdiction of the federal courts." *Id.* at *7.

For more information, contact David Fioccola at dfioccola@mofo.com.

Supplying Consent

The Eleventh Circuit upheld the dismissal of a proposed class action accusing a hospitality technology company of sending unsolicited faxes containing non-compliant opt-out notices. *Gorss Motels, Inc. v. Safemark Systems, LP*, 931 F.3d 1094 (11th Cir. 2019). The court found that the plaintiffs' franchise agreements with a hotel group authorized contact by hotel-group-approved suppliers and that plaintiffs had provided their fax numbers. Because plaintiffs consented to receive such support from suppliers, the faxes they received were lawful and opt-out notices were not required.

For more information, contact David Fioccola at dfioccola@mofo.com.

BSA/AML

They Can See Clearly Now

Several banking agencies issued a Joint Statement clarifying their risk-based approach to the examination of banks' BSA/AML compliance programs. The Statement does not establish new requirements. It confirms that the agencies are using a risk-focused approach to planning and performing BSA/AML examinations. In a related press release, FinCEN Director Kenneth A. Blanco emphasized that the agencies "recognize that not all financial institutions share the same risk profile" but that the agencies "are working to ensure that regulators are following a common process for assessing compliance." In addition to describing this risk-based approach to supervision, the Statement discourages banks from what is commonly referred to as "de-risking."

For more information, contact Marc-Alain Galeazzi at mgaleazzi@mofo.com.

Foreign Money Laundering Focus

FinCEN announced the creation of a new division that will be responsible for implementing targeted investigation strategies based on FinCEN's implementation and enforcement authorities under the BSA to combat anti-money laundering and countering the financing of terrorism (AML/CFT) and related crimes in the United States and abroad. The new division is called Global Investigations Division (GID) and will work more closely with foreign counterparts to coordinate actions against AML/CFT-related threats. The GID will be led by Matthew Stiglitz, a former Principal Deputy Chief in the Department of Justice Criminal Division.

For more information, contact Marc-Alain Galeazzi at mgaleazzi@mofo.com.

This newsletter addresses recent financial services developments. Because of its generality, the information provided herein may not be applicable in all situations and should not be acted upon without specific legal advice based on particular situations.

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